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Federal Courts--Jurisdictional Amounts--Legal Certainty

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tions can be erased from it. The case seems to present a more rational approach to the problem than does the principal case. It is submitted that the caution necessary in the use of inaudible recordings is not provided by the cases which base their admission or exclusion on the analogy used by the court in the *Cape* case, and that a more desirable approach is represented by the *Wright* decision.

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Federal Courts—Jurisdictional Amount—Legal Certainty

In an action grounded on diversity of citizenship in the District Court of the Southern District of West Virginia, *P* claimed damages in the amount of 6,000 dollars for breach of contract. *P* based his claim on the premise that the statement for 2,960 dollars sent to *D* for professional services as an architect was merely a compromise offer and could not become an account stated without the acceptance by *D*. *D* moved to dismiss, challenging the jurisdiction of the court on the ground that the amount actually in controversy was less than 3,000 dollars because *P* could not recover more than this amount by the terms of the contract. The motion was granted. The Court of Appeals held that the District Court was without jurisdiction where, from a statement sent by *P* to *D*, it appeared as a legal certainty that *P* could not recover the jurisdictional minimum. *Nixon v. Loyal Order of Moose Lodge No. 750,* 285 F.2d 250 (4th Cir. 1960).

A federal court will dismiss a diversity action for want of jurisdiction if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional minimum. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283 (1938). The federal district court was bound to apply West Virginia law, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and it thus appears that under the facts of the principal case that the Fourth Circuit Court of Appeals held that the plaintiff cannot recover an amount in excess of 3,000 dollars.

The court said that *P's* recovery was limited by the terms of the written agreement. However, *P* contended that the statement he sent was merely a compromise offer to *D* which was not accepted by *D*. Furthermore, *P* contended that there was nothing in the contract which made it incumbent upon him to make the reasonable

estimated cost of the building. *P* cited the following West Virginia decisions in support of his compromise theory: *Smith v. Atlas Pocahontas Coal Co.*, 66 W. Va. 559, 66 S.E. 746 (1909), and *Gillespie v. Scottish Ins. Co.*, 61 W. Va. 169, 56 S.E. 213 (1906). These cases hold respectively that an offer to compromise a dispute as to the amount of damages for breach of a mining contract and as to the balance due on a note involving claims for an unascertained sum, but which offer is not accepted, is not a bar to an action to recover the full amount claimed to be due. *D* distinguished *P's* cases on their facts, while citing *Orth v. Board of Educ.*, 272 Pa. 411, 116 Atl. 366 (1922), 3 AM. JUR. *Architects* § 11 (1936), and Annot., 20 A.L.R. 1356 (1922) in support of *D's* position that *P's* own estimate which accompanies his plans is the reasonable estimated cost intended by the contract. Thus, *P* cannot recover more than 6% of this cost estimate. Certainly there is nothing wrong with the law in *D's* citations, but they are merely persuasive authority and not binding upon the courts in West Virginia. 1 BEALE, CONFLICT OF LAWS § 5.4 (1935). Therefore, since *D* contends that *P's* West Virginia citations are not on point and the only law cited by *D* to support his argument is from foreign jurisdictions, it would seem that the issue under discussion has not been decided in West Virginia.

With the authorities in this posture, it appears dubious that it can be accurately stated that the recovery sought by the plaintiff is denied by West Virginia law to a legal certainty.

There is a possible second theory upon which this conclusion could have been reached. Thus, *P's* demand of *D* for the 2,960 dollars may have been viewed as an account stated.

When looking at the arguments upon *P's* account rendered theory, the same difficulty of unsettled law in West Virginia is encountered. *P* cites *E. I. Du Pont etc. Co. v. Valley Supply Co.*, 119 W. Va. 645, 195 S.E. 596 (1938), and *LeGrand v. Hambrick*, 116 W. Va. 572, 182 S.E. 577 (1935) in support of the proposition that an account rendered is only converted into an account stated by the express or implied assent of the party to be charged. Again, the factual situations were distinguished by *D*, while again only citing the same secondary authority. Obviously, for the same reasons, it would seem that this second issue has not been decided in West Virginia either.

No further West Virginia authority was found which would tend to clear up the uncertainty as to the issues involved here. However, some authority was found concerning accounts stated which would tend further to indicate that the question is unsettled under West Virginia law. In *Hoover-Dimeling Lumber Co. v. Neill,* 77 W. Va. 470, 87 S.E. 855 (1916), the court said that an account stated does not create an estoppel, although it affords presumptive evidence of the accuracy and correctness of the charges stated. The court added that such presumption may be rebutted by showing fraud, mistake or error in its execution or procurement unless the position of the opposite party has been altered to his prejudice. While not saying that *P* in the principal case could bring himself within this rule of law, can it be said as a legal certainty that *P* cannot rebut the accuracy and correctness of the account stated? To be a legal certainty in this jurisdiction, would it not require a decision on this precise point by the Supreme Court of Appeals of West Virginia? Furthermore, any rebuttal evidence should go to the jury. *Antonowich v. Home Life Ins. Co.,* 116 W. Va. 155, 179 S.E. 601 (1935).

In addition to the unsettled problems already presented by the principal case, one more might be added. The rule that an account rendered is converted into an account stated by the passage of time without objection is generally inapplicable in West Virginia, except as between merchant and merchant, and principal and agent, with mutual accounts. *Price Hill Colliery Co. v. Pinkney,* 96 W. Va. 74, 122 S.E. 434 (1924); *McGraw v. Trader's National Bank,* 64 W. Va. 509, 63 S.E. 398 (1908). Is an architect an agent? No West Virginia cases were found treating this question. But to give some idea of the problem involved, *Mackay v. Benjamin Franklin Realty & Holding Co.,* 288 Pa. 207, 135 Atl. 613 (1927) held that as far as the preparation of plans is concerned, an architect generally acts as an independent contractor. But in *Edward Barron Estate Co. v. Woodruff Co.,* 163 Cal. 561, 126 Pac. 351 (1912), the court said that when performing supervisory functions, an architect ordinarily acts as an agent. In the principal case, *P* apparently never progressed beyond the preparation of plans phase of his contract. It would seem then, that before the court in the principal case could rule that it was a legal certainty that *P's* statement had become an account stated, that the Supreme Court of Appeals of West Virginia would have had to have previously de-

cided that an account stated could be created between an architect and his employer.

The court refused to take jurisdiction in the principal case on the ground that it appeared to a legal certainty that *P* could not recover the jurisdictional minimum. In reaching this decision, the court was apparently convinced by law decided in jurisdictions other than West Virginia. Since the law was not settled in West Virginia, the court's procedure appears to be contrary to accepted jurisdictional principles. *Calhoun v. Kentucky-West Virginia Gas Co.,* 166 F.2d 530 (6th Cir. 1948). There is no doubt that if the court had taken jurisdiction that it would have probably been justiifed in ruling that *P* could not recover more than the amount listed on his statement. But the point proposed is that the better procedure would seem to be that the court should have taken jurisdiction and then decided the law. This would have precluded the creation of any ambiguity as to how a legal certainty is determined, thereby making the path a little easier for subsequent litigants who must prognosticate.

Esdel Beane Yost

Federal Courts—Limitations on the Use of the Federal Declaratory Judgment Act in Determining the Validity of Fund Transfers Under the Labor Management Relations Act

Ps, trustees of a joint labor-management health and welfare fund, sought a determination of the validity of a proposed transfer of surplus funds in the health and welfare fund to a newly established pension plan. *Ds* are the union and management. Action is for a declaratory judgment. *Held,* dismissed for lack of jurisdiction. The Declaratory Judgment Act did not give federal courts jurisdiction over the administration of trusts, but only enlarged the range of remedies where federal jurisdiction previously existed. *Kane v. Shulton, Inc.,* 189 F. Supp 882 (D.N.J. 1960).

An understanding of the statutes imposing restrictions on payments to employee representatives is necessary in order to fully understand the issue presented by the instant case. Payments or contributions by employers and receipts or acceptance by representatives of employees of money or other things of value are expressly prohibited, with certain specific exceptions. 61 STAT. 157 (1947), 29 U.S.C. § 186 (1952). Included among the exceptions